

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE APPLICATION OF THE UNITED
STATES OF AMERICA FOR AN ORDER
PURSUANT TO 18 U.S.C. § 2703(d)

MISC NO. 10GJ3793,
No. 1:11-DM-3
No. 1:11-EC-3

**REAL PARTIES IN INTEREST JACOB APPELBAUM, ROP GONGGRIJP, AND
BIRGITA JONSDOTTIR'S NON-CONFIDENTIAL MEMORANDUM
ACCOMPANYING (1) MOTION FOR SEALING AND (2) MOTION FOR IMMEDIATE
UNSEALING**

COMES NOW Real Parties in Interest Jacob Appelbaum, Rop Gonggrijp, and Birgitta Jonsdottir, by and through their counsel, and respectfully submit to this Honorable Court this memorandum in support of their (1) Motion for Sealing and (2) Motion for Immediate Unsealing, pursuant to E.D. Va. Local Criminal Rule 49(E) and/or E.D. Va. Local Civil Rule 5. In support of their motion, Real Parties offer the following:

I. ITEMS TO BE SEALED

Real Parties ask the Court to seal the Motion to Seal and Motion for Immediate Unsealing and the documents being filed with that Motion – the Real Parties' Notice, the Declaration of Stuart Sears and the proposed Order. Although Real Parties do not believe that these documents are confidential or that there is any reason for sealing them, *see* Motion to Seal and Motion to Unseal at 1-2, the Government has not agreed that the documents can be publicly filed and has indicated that, in its view, the documents should be filed under seal, at least initially. Given the Government's position, Real Parties request that these documents initially be placed under seal. As noted in the accompanying Motion, Real Parties simultaneously ask that, after these documents are sealed upon filing, the Court immediately grant their request to unseal

their Motion and the attached documents.

II. AUTHORITY FOR SEALING AND UNSEALING DOCUMENTS

There is a presumption of access to judicial proceedings and to all judicial records under both the First Amendment and the common law. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). This presumption of access under the First Amendment may be overcome “by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest,” *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984), or, under the common law, if “‘countervailing interests heavily outweigh the public interests in access.’” *Va. Dep't of State Police*, 386 F.3d at 575 (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

Where a Court determines that formally sealed documents should be unsealed, the documents should be unsealed promptly because “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Fourth Circuit has similarly made clear that delay in unsealing improperly sealed documents is impermissible, because it “‘unduly minimizes, if it does not entirely overlook, the value of ‘openness’ itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.’” *See, e.g., In re Application and Affidavit for Search Warrant*, 923 F.2d 324 (4th Cir. 1991).

Real Parties do not believe that the public’s right of access to these documents is heavily outweighed by any competing interests or that closure is either essential to preserve any higher values or narrowly tailored to serve such values. The Government has nevertheless refused to agree that the documents can be filed publicly and has indicated that the documents should, in its view, initially be sealed upon filing. For that reason, Real Parties submit this memorandum in support of their motion to seal the documents initially and then immediately to unseal them.

III. PERIOD OF TIME TO HAVE REQUESTED DOCUMENTS PLACED UNDER SEAL

Based on the Government's indication that the documents should be filed under seal initially, Real Parties request that these documents be sealed temporarily upon initial filing. Real Parties also request that such documents be immediately unsealed once the Court has had the opportunity to review, and rule upon, the Real Parties' accompanying Motion to unseal these documents.

WHEREFORE based on the Government's indication that these documents should be filed under seal initially, Real Parties respectfully request that an Order be entered allowing their Motion to Seal and Motion to Unseal and the related documents filed therewith, to be placed under seal temporarily, until the Court rules on their motion to unseal these documents.

Dated: September 20, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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I also certify that on this 20th day of September, 2011, I caused the following party to be served by first-class United States mail:

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